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Supreme Court, U. S.
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No. 96-52

In The

Supreme Court of the United States

October Term, 1995

RAYMOND REECE,

Petitioner,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fifth Circuit correctly interpreted this Court's precedents in holding that, under the narrow factual scenario presented, Petitioner's state-law claims were preempted by federal labor law, and therefore removable, because they required an interpretation of a collective bargaining agreement.

PARTIES TO THE PROCEEDINGS

Petitioner:

RAYMOND REECE

Respondent:

HOUSTON LIGHTING & POWER COMPANY

Entities affiliated with Respondent:

DEVELOPMENT VENTURES, INC.; HOUSTON INDUSTRIES INCORPORATED; HOUSTON INDUSTRIES FINANCE, INC.; HOUSTON INDUSTRIES ENERGY, INC.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent requests that the Court deny the Petition for Certiorari ("Petition") seeking review of a decision by the United States Court of Appeals for the Fifth Circuit because this is a seniority dispute subject to a grievance-and-arbitration procedure, because there exists an adequate and independent basis for removal, because the Fifth Circuit's decision correctly interpreted the law, and because Petitioner's prediction of dire consequences for the judicial system arising from the decision below wholly lacks merit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 79 F.3d 485 (5th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3084 (U.S. July 9, 1996) (No. 96-52), and appears in the Appendix to this brief at 1a-5a. The pertinent orders of the district court are reported at 66 Empl. Prac. Dec. (CCH) ¶ 43,680 (S. D. Tex. 1995), and 151 L.R.R.M. (BNA) 2477 (S. D. Tex. 1995). They are printed at App. 6a-13a and 14a-17a.

JURISDICTION

The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 (1994) in that this action arose under the laws of the United States, specifically the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-187 (1994). The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C.

§ 1291 (1994). Petitioner attempts to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case implicates § 301(a) of the LMRA, 29 U.S.C. § 185(a), and the removal statute, 28 U.S.C. § 1441(1994).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Courts Below.

Petitioner Raymond Reece ("Petitioner") is a current employee of Respondent Houston Lighting & Power Company ("Respondent"). His employment is subject to a collective bargaining agreement ("CBA") between Respondent and the International Brotherhood of Electrical Workers, Local Union No. 66. In his Original Petition in Texas state court, Petitioner complained of being denied promotions and training opportunities out of line of his seniority as provided by the CBA. Respondent answered and removed the case to the United States District Court for the Southern District of Texas on the ground that a federal question was necessarily presented under *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968). Petitioner ostensibly pleaded causes of action for intentional infliction of emotional distress under Texas common law and for race discrimination and retaliation under the Texas Labor Code Ann. §§ 21.051, -.055 (Vernon

Supp. 1995).[1] Because the resolution of those claims would have required the interpretation of applicable collective bargaining agreement ("CBA") provisions dealing with seniority, training, and promotions, § 301 of the LMRA preempted both of Petitioner's causes of action.

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[1] Petitioner avers that he "deliberately confined his allegations to violations of state law, and pleaded no claim under . . . any other federal law." (Pet. at 4.) Petitioner's artful pleading is of no consequence in determining whether the district court had jurisdiction. As Petitioner is surely aware, but has conveniently neglected to mention, because Congress intended for "doctrines of federal labor law uniformly to prevail over inconsistent local rules," *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), this Court has concluded that the preemptive force of § 301 is so powerful that it displaces any state-law cause of action alleging, in form or substance, a breach of a collective bargaining agreement. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 406 n.5 (1988). Furthermore, the Court has interpreted § 301 to preempt causes of action other than those denominated as breach of contract claims, *see, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 218-19 (1985), so that the LMRA recharacterizes state-law claims that would require interpretation of a CBA into claims arising under federal law. *See United Steelworkers v. Rawson*, 495 U.S. 362, 366-67 (1990); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980) (per curiam) ("Mere omission of reference to LMRA § 301 in the complaint does not preclude federal subject matter jurisdiction. The court's recharacterization of Fristoe's complaint as one arising under § 301 is required by federal pre-emption doctrine. When principles of federal labor law are involved, they supersede state contract law or other state law theories."). Thus, how Petitioner chose to style his claims has no bearing on whether those claims actually present a controversy arising under federal law.

The district court denied Petitioner's motion to remand. (App., *infra*, 14a.) Petitioner then sought reconsideration of the order denying remand, which the district court also denied, concluding that § 301 preempted Petitioner's causes of action because they involved "questions of promotability, seniority, and work assignments," which rendered them "inextricably intertwined with the terms of the CBA." (App., *infra*, 16a.) Subsequently, Respondent moved for summary judgment on the ground that Petitioner failed to exhaust his contractual remedies and that his claims were time-barred. The district court granted Respondent's motion, finding no basis for Petitioner's failure to invoke the contractually exclusive grievance-and-arbitration procedures. (App., *infra*, 12a.)

Petitioner appealed, but he sought review only of the denial of his motion to remand, not of the summary judgment. The United States Court of Appeals for the Fifth Circuit affirmed the order denying remand, concluding that, under *Lingle*, 486 U.S. at 407 n.7, Petitioner's statutory discrimination claim was inextricably intertwined with the CBA, notwithstanding the "nonnegotiable" nature of the rights he purported to invoke. (App., *infra*, 3a.) Alternatively, the Fifth Circuit held that Petitioner's common law emotional stress claim was also preempted, which likewise supported removal. (App., *infra*, 3a-4a.)

B. Statement of Facts.

The opinion of the Fifth Circuit correctly sets forth the facts of the case. In the interest of brevity, Respondent

respectfully directs the Court's attention to that opinion. (App., *infra*, 1a-2a.)

REASONS WHY THE WRIT SHOULD BE DENIED

I. Seniority Disputes, Such as the One Raised by Petitioner, are Redressable Through the Grievance-and-Arbitration Machinery.

Seniority is at the heart of Petitioner's case. Petitioner's theory of recovery centers on the allegation that "white employees *with less seniority than he*" received training and promotions to which he was entitled. (Pet. at 3 (emphasis added).). Seniority is one of the factors for consideration in selecting and assigning employees, such as Petitioner. "Seniority" is also the subject of an entire article of the CBA. (R. at 000079-75.)

This Court long ago recognized that "[s]eniority arises only out of contract or statute. An employee has no inherent right to seniority in service. . . . In private employment seniority is typically created and delimited by a collective bargaining agreement." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53 n.21 (1947) (citations omitted). Unless a party contends that an entire seniority system is discriminatory,[2] a contention Petitioner has never advanced, disputes about the seniority provisions of a CBA are not redressable under federal or state anti-discrimination laws or common-law tort theories, but rather through the contractual grievance-and-arbitration machinery or a suit under § 301 of the LMRA. *See John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 554 (1964)

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[2] *See Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 904-05 (1989).

("There is thus no question that had a dispute concerning any of these subjects, such as seniority rights or severance pay, arisen between the Union and [Interscience][,] . . . it would have been arbitrable."); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566-68 (1960) (holding that dispute over reinstatement of employee under seniority provision was subject to mandatory arbitration clause).[3] Petitioner's claims present just the sort of garden variety seniority disputes that the Court in *John Wiley & Sons* indicated are subject to arbitration.[4]

Petitioner believes his seniority should have entitled him to various promotions and training opportunities. The CBA, however, governs work assignments (such as

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[3] *See also Kelly v. American Tel. & Tel. Co.*, Civ. No. 91-179-P-H, 1993 WL 206289, at *5 (D. Me. Apr. 20, 1993) ("The CBA between AT&T and IBEW is the immediate source of the plaintiff's rights concerning seniority, vacation, and shift choices. Because her claims are substantially dependent on the terms of the CBA, the LMRA preempts them. . . . "); *DuPuis v. International Bhd. of Elec. Workers, Local 58*, 119 L.R.R.M. (BNA) 2033, 2035-36 (E.D. Mich. 1984) (stating that "[s]eniority . . . has long been a quintessential issue of collective bargaining" and holding that employee's common law breach of contract action concerning seniority rights was preempted by § 301).

[4] The CBA between Respondent and IBEW Local No. 66 provides for the arbitration of any grievance and defines a "grievance" as: "[A]ny dispute involving the proper application or interpretation of this Agreement, or a claim that an employee has been unreasonably and unjustly discriminated against." (CBA, art. XVI, § 1; R. at 000082.) The CBA also provides that "[t]here shall be no unlawful discrimination against an employee by the Company, Union or any other employee because of race, color, disability, religion, age (over 40), sex or national origin. The same standards will apply to veterans of the Vietnam era." (CBA, Purpose; R. at 000107.)

training) and promotions for employees having Petitioner's job classification. (CBA, art. XV, § 6; R. at 000085.) A determination of the extent to which the CBA required that Respondent consider Petitioner's seniority in making these sorts of decisions would necessarily have entailed a construction of the CBA. The need for a state court to interpret Petitioner's seniority rights in order to adjudicate his causes of action leads to their preemption by the LMRA. *See Davis v. Johnson Controls, Inc.*, 21 F.3d 866, 868 (8th Cir.) (holding that state-law discrimination claim was preempted where court would "interpret[ ] the provisions of the [collective bargaining] agreement relating to seniority rights"), *cert. denied*, 115 S. Ct. 426 (1994); *cf. United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 63-64 (1981) ("Although the present case involves a fairly mundane and discrete wrongful-discharge complaint, the grievance and arbitration procedure often processes disputes involving interpretation of critical terms in the collective bargaining agreement affecting the entire relationship between company and union."); *Humphrey v. Moore*, 375 U.S. 335, 343-44 (1964) (stating that dispute concerning seniority rights of all employees, even if brought in state court, was "one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law") (citations omitted).

II. Because the Decision Below Did Not Rely Solely on the Preemption of Petitioner's Statutory Race Discrimination Claim as a Basis For Denying Remand, This Case Does Not Represent an Appropriate Vehicle for Reaching the Merits of the Central Issue Raised in the Petition.

A. Despite Petitioner's Attempt to Commingle His Causes of Action Under the Heading of "Employment Discrimination Complaints," He Has Pleaded Two Independent Claims.

This Court has stated on numerous occasions that it "reviews judgments, not opinions." *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956) (same); *Texas v. Hopwood*, No. 95-1773, slip op. at 1 (U.S. July 1, 1996) (opinion of Ginsberg, J., concerning denial of petition for writ of certiorari). Pursuant to this rule, "if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). Accordingly, this Court has declined to review cases when there exists an adequate and independent basis to support the judgment. *See, e.g., Sommerville v. United States*, 376 U.S. 909 (1964) (denying certiorari despite a live conflict regarding whether federal or state law controlled because it was evident that the resolution of that conflict could not change the result reached below); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [issue in conflict among the circuits] can await a day

when the issue is posed less abstractly."). That principle applies to this case because the preemption of Petitioner's emotional distress claim warranted denial of the motion to remand whether or not Petitioner's discrimination claims were preempted.

Petitioner seeks to conflate his disparate claims under the heading of "employment discrimination complaints." (Pet. at 8.) In particular, he styles his claims under the Texas Labor Code as a "statutory discrimination claims"[5] and his emotional distress cause of action as a "tortious discrimination claim." (*Id.* at 7.)[6] Petitioner may not avoid the adequate and independent basis rule by reformulating his causes of action at this stage of the proceedings. Petitioner pleaded two independent causes of action, one for the state-law tort of intentional infliction of emotional distress, and another for race discrimination and retaliation in violation of the Texas Labor Code §§ 21.051, -.055. (App., *infra*, 2a-3a.)

Texas law holds that the tort of intentional infliction of emotional distress does not encompass "mere employment disputes," and the tort does not apply to discrimination claims. *MacArthur v. University of Tex. Health Care Ctr. at Tyler*, 45 F.3d 890, 898-99 (5th Cir. 1995) (applying Texas law); *Ugalde v W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993) (applying Texas law) (holding that calling employee "Mexican" and "wetback" was not actionable in tort and stating that "[e]ven conduct which

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[5] *Id.* at 6.

[6] *See also id.* at 16 (acknowledging that Petitioner is attempting to recharacterize "his racial discrimination claim in the form of the tort of intentional infliction of emotional distress").

may be illegal in an employment context may not be the sort of conduct constituting extreme and outrageous conduct"); *Cook v. Fidelity Inv.*, 908 F. Supp. 438, 441 (N.D. Tex. 1995) (applying Texas law) ("Cook's allegations in connection with this [emotional distress] claim are duplicative of his allegation supporting his racial discrimination claims. The allegations do not give rise to an additional claim for intentional infliction of emotional distress."). Indeed, absent federal and state antidiscrimination statutes, the common law generally does prohibit discrimination on any basis by a private employer. *See* Lex K. Larson, Employment Discrimination § T117.10, at T-2895 to T-2896 (1996) ("Congress enacted these [antidiscrimination] laws against the backdrop of an established doctrine of American employment law, under which an employer can discharge an employee at will 'for good cause, for no cause or even for cause morally wrong.' Outside of the discrimination laws and some special purpose statutes, there is simply no general statutory law which alters this basic rule."). Petitioner's exclusive remedy for employment discrimination under Texas law is an action under chapter 21 of the Texas Labor Code. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 488 (Tex. 1991) (stating that provisions of Texas antidiscrimination statute are "mandatory and exclusive"); *see also Stinnett v. Williamson County Sheriff's Dep't*, 858 S.W.2d 573, 576 (Tex. Ct. App. 1993).

In this case, the adverse employment decisions, irrespective of their motivation, constituted the "outrageous" conduct giving rise to the tort claim.[7] By contrast,

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[7] Such conduct is arguably not even actionable under the claimed tort theory. *Johnson v. Merrell Dow Pharmaceuticals, Inc.*,

Petitioner's statutory discrimination claims are dependent upon Respondent's alleged racial animus in making various employment decisions. (Pet. at 12.) Petitioner's two causes of action are thus self-contained and distinct.

B. The Preemption of Petitioner's Emotional Distress Claim, Which Is Substantially Dependent on an Analysis of the CBA, Adequately Supports the Judgment.

The Court should deny the Petition because preemption of the tort claim provided an independent basis for removal and the denial of remand. Petitioner only appealed the district court's denial of his motion to remand, not the summary judgment. The Fifth Circuit found that both of Petitioner's claims were preempted by the LMRA and that remand was properly denied. (App., *infra*, 3a, 5a.) Only one of Petitioner's claims need be preempted in order to support removal,[8] and preemption of the emotional distress claim would support the judgment below even if the court of appeals' disposition of Petitioner's statutory discrimination claim were reversed.

The test for preemption of a state-law tort claim is well-settled: the LMRA preempts "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in

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965 F.2d 31, 33-34 (5th Cir. 1992) (per curiam) (applying Texas law).

[8] *Graef v. Chemical Leaman Tank Lines*, 860 F. Supp. 1170, 1172-74 (E. D. Tex. 1994). *See also Rodriguez v. Pacificare of Tex., Inc.*, 980 F.2d 1014, 1016-19 (5th Cir.) (holding that district court had supplemental jurisdiction over non-preempted claims under 28 U.S.C. § 1367), *cert. denied*, 508 U.S. 956 (1993).

a labor contract." *Lueck*, 471 U.S. at 220; *see also International Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 858 (1987) ("[A] tort claim 'inextricably intertwined with the consideration of the terms of the labor contract' is preempted under § 301. . . . "). Under this test, the Court held in *Lueck*,[9] *Hechler*,[10] and *United Steelworkers v. Rawson*[11] that the tort claims at issue could not survive LMRA preemption because they could not "be described as independent of the collective-bargaining agreement." *Rawson*, 495 U.S. at 371. Similarly, numerous courts of appeals have held that the LMRA generally preempts claims for intentional infliction of emotional distress when the claims relate to terms and conditions of employment and are largely dependent on the terms of a CBA.[12]

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[9] 471 U.S. at 211.

[10] 481 U.S. at 859.

[11] 495 U.S. 362, 371 (1990).

[12] *See, e.g., DeCoe v. General Motors Corp.*, 32 F.3d 212, 219-20 (6th Cir. 1994); *Bagby v. General Motors Corp.*, 976 F.2d 919, 921-22 (5th Cir. 1992); *Mock v. T.G.&Y Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 536-37 (4th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1048 (1992); *Douglas v. American Info. Technologies Corp.*, 877 F.2d 565, 572 (7th Cir. 1989); *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989); *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1149-50 (9th Cir. 1988); *Knafel v. Pepsi Cola Bottlers of Akron, Inc.*, 850 F.2d 1155, 1162 (6th Cir. 1988); *Bradshaw v. General Motors Corp., Fisher Body Div.*, 805 F.2d 110, 111 (3d Cir. 1986); *Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1350 (9th Cir. 1985).

The circumstances of this case demonstrate that Petitioner's emotional distress claim is preempted. Under Texas law, for Petitioner to sustain his emotional distress claim he must prove[13] that "(1) the defendants acted intentionally or recklessly; (2) the defendants' conduct was extreme and outrageous; (3) the defendants' actions caused . . . [Petitioner's] emotional distress; and (4) . . . [Petitioner's] emotional distress was severe." *Baker v. Farmers Elec. Co-op., Inc.*, 34 F.3d 274, 280 (5th Cir. 1994) (applying Texas law). If any of the elements of Petitioner's emotional distress claim requires an interpretation of the CBA, § 301 preempts it. *Stikes v. Chevron U.S.A., Inc.*, 914 F.2d 1265, 1268 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991).

The "outrageous" conduct on which Petitioner relies pertains to basic employment-related matters such as seniority, promotion, and training – all of which are regulated by the CBA. (R. at 000053-52.) Petitioner alleges, inter alia, that "the conduct of HL&P as described above" in his Original Petition caused him to suffer "great anxiety, mental anguish, indignation, disappointment and wounded pride." (Pl.'s Orig. Pet. ¶ VI; R. at 000053.) The "described above" conduct appears in Paragraph V of the Original Petition, which detailed the promotions and training opportunities denied Petitioner, allegedly in violation of the CBA's seniority provisions. (R. at 000053.)

To establish this claim, Petitioner must prove that the promotions that were denied to him, the misapplication

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[13] In Texas, "the employee has the burden of proving wrongful conduct by the employer." *Thomas v. LTV Corp.*, 39 F.3d 611, 619 (5th Cir. 1994) (applying Texas law).

of the seniority preference in such decisions, and that the refusals of his requests for training classes constituted "extreme and outrageous" conduct. This burden entails proof that the employer's actions or decisions were wrongful, i.e., that at a minimum they violated the CBA. For this reason alone Petitioner's claim is preempted. *Thomas*, 39 F.3d at 619 ("Thomas must demonstrate that LTV's conduct was wrongful under the circumstances. To determine whether LTV's conduct was wrongful under the circumstances, an analysis of the collective bargaining agreement is necessary."). As one commentator has noted, "[w]hen the conduct arises out of the employer-employee relationship and a collective bargaining agreement is in place, the employer's conduct necessarily must be examined against the contract. . . . That inquiry itself, moreover, involves a question of federal contract interpretation, thus preempting the claim." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala. L. Rev. 377, 420 (1989) (citing *Newberry*, 854 F.2d at 1146; *Knafel*, 850 F.2d at 1162); *see also Truex*, 784 F.2d at 1350.

The CBA contains the following provisions with regard to the selection, promotion, transfer, and/or assignment of employees covered thereby, including "Head Journeymen," Petitioner's classification:

> *Selection, promotion,* demotion, *transfer* and/or *assignment* of *Head Journeymen* and Head Operators listed in this article or elsewhere in this Agreement shall be within the sole discretion of the Company, and shall be with the approval of the Department Head. Consideration may

include, but is not limited to, ability, skill, qualifications, performance, *seniority*, attendance, and conduct.[14]

Except as to *Head Journeymen* and Head Operators as described in Article XI, Section 6, in the event of *promotions*, layoffs, or a permanent reduction in the working force, where ability, skill and qualifications are equal, *seniority* shall govern. When Company dètermines to *transfer* employees from one location to another, Company will request volunteers and select the *senior* volunteers where ability, skill and qualifications are equal; if there are not sufficient volunteers with the required ability, skill and qualifications, Company will select the employees with the *least seniority* where ability, skill and qualifications are equal. The Company shall determine ability, skill and qualifications, subject to an employee's right to assert a grievance under Article XVI. *Promotions* to positions not covered by the Agreement shall be within the sole discretion of the Company. Temporary positions may be filled at the discretion of the Company. With the exception of *replacements* or *promotions* made necessary because of illness or leaves of absence, a *temporary position* shall not exceed ninety (90) work days.[15]

"Seniority" is defined in art. XVII, §§ 5-6:

Section 1. An employee shall be considered a probationary employee and shall not acquire any *seniority* until completion of one hundred fifty (150) work days in the employ of the Company. During such period, said employee's employment may be terminated at any time

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[14] CBA, art. XV, § 6; R. at 000085 (emphasis added).

[15] CBA, art. XVII, § 3; R. at 000076 (emphasis added).

with or without cause. After such period, said employee shall be a regular employee and his *seniority* shall date from his original date of employment. If two or more employees have the same original date of employment, their relative *seniority positions* shall be determined by random draw.

Section 5. *Seniority* and continuity of service shall be terminated when an employee quits or is discharged for cause.

If the employee has not quit or been discharged for cause, his *seniority* and continuity of service may be considered terminated where,

(a) An employee is laid off for a period exceeding one (1) year;

(b) An employee fails to return to work after the termination of an authorized leave of absence;

(c) An employee fails to report to work within three (3) scheduled days after notice to report to work;

(d) An employee is absent three (3) consecutive scheduled days without permission.

Section 6. The Company shall post on bulletin boards within ninety (90) days after the execution date of this Agreement a list showing the hiring date of each employee and will revise the same semi-annually. An employee may protest his *seniority* position within a period of thirty (30) days after the posting of such list, and if dissatisfied with Company action thereon may assert a grievance under Article XVI; provided that failure to protest within said thirty (30) days shall constitute a waiver of any further right of protest, and the *seniority* position set

> forth in said list shall be conclusively deemed to be correct.

R. at 000079-65 (emphasis added).

The emotional distress claim thus implicates, and will require interpretation of, the terms of the CBA in the analysis of whether Respondent's conduct, including its use or non-use of seniority as a criterion in the relevant employment decisions, was "extreme and outrageous." *See Thomas*, 39 F.3d at 619; *Douglas*, 877 F.2d at 572 ("If Illinois Bell's conduct . . . was authorized under the collective bargaining agreement. . . . then it would have been exercising its 'legal rights in a permissible way.' Such conduct cannot be characterized as 'extreme and outrageous. . . . ' ") (quoting *Public Fin. Corp. v. Davis*, 360 N.E.2d 765, 768-69 (Ill. 1976)). Since Petitioner's emotional distress claim is "inextricably intertwined" with the CBA's provisions regarding seniority, and its clauses relating to the promotion and assignment of employees, his common law tort claim must yield to § 301. *Hechler*, 481 U.S. at 862 (holding that plaintiff's tort claim was preempted because "it is clear that 'questions of contract interpretation . . . underlie any finding of tort liability' "). The preemption of Petitioner's tort claim therefore allowed Respondent to remove this case and provided a sufficient basis for denying remand.

III. Because the Court of Appeals Correctly and Narrowly Applied This Court's Decision in *Lingle* in Connection With Petitioner's Discrimination Claim, the Purported Conflict With the Decisions of This Court is Illusory.

Petitioner forecasts that, as a result of the decision below, the "mere invocation" of a CBA will provide a successful basis for removal under the LMRA, and that

the decision "will *always* lead to preemption of both discrimination and retaliation cases." (Pet. at 15.) These assertions distort the import of the Fifth Circuit's decision, which is a straightforward and correct application of *Lingle*.

A. The Court of Appeals Used the Proper Test for LMRA Preemption.

Petitioner suggests that, under the decision below, preemption would occur *whenever* a party claimed that a court would have to "*look at* the CBA." (Pet. at 6, emphasis added).) Petitioner multifariously suggests that the court of appeals' decision would mandate preemption in any case when "the CBA could be relevant to the disposition of a state law claim,"[16] when the "employer did no more than point to a provision in the CBA,"[17] or when "the employer has *asserted* justifications based on the CBA."[18] Petitioner ultimately predicts that, under the court of appeals' decision, "the mere invocation of a CBA entitles the employer to remove every state-law-based employee claim to federal court."[19] Petitioner protests too much.

The court of appeals followed the law as enunciated in *Lueck* and *Lingle*. The court observed that, "[i]f the resolution of Reece's claims will require 'interpretation' of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA." (App., *infra*, 2a (citing *Lingle*, 486 U.S. at 405-06).) The court of

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[16] *Id.* at 11.

[17] *Id.* at 12.

[18] *Id.* at 16.

[19] *Id.* at 19.

appeals further noted that "the dispute is whether the CBA must be interpreted in resolving Reece's claims." (*Id.*)[20] These standards accord fully with this Court's statement in *Lingle* that, "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law . . . is preempted," 486 U.S. at 405-06, and its statement in *Lueck* that LMRA preemption occurs "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. *See also Rawson*, 495 U.S. at 371; *Hechler*, 481 U.S. at 858. Thus, Petitioner's suggestion that the circuit court's decision "stands virtually alone" in its approach to LMRA preemption does not survive even cursory scrutiny.[21]

Additionally, contrary to Petitioner's unwarranted all-or-nothing preemption argument, the circuit court's decision does not hold that "state law[s] are automatically preempted" whenever a CBA is implicated. (Pet. at 8.) Nor does it stand for the proposition that the LMRA will "always" preempt a state antidiscrimination claim. To the contrary, this case presents a narrow, factually distinct case, the *"rare case"* to which the Supreme Court adverted in *Lingle* when it observed that the assertion of a

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[20] *Id.* at 3a ("[T]he CBA would have to be interpreted because Reece would have to challenge HL&P's rights under the CBA.").

[21] Petitioner's reliance on *Hawaiian Airlines, Inc. v. Norris*, 114 S. Ct. 2239, 2248 (1994), a case involving the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-188 (1988), is misplaced. *Norris* purported to rely on the *Lingle* preemption standard. Thus, *Lingle*, along with *Lueck*, continues to constitute the proper rule of decision in LMRA preemption cases.

"nonnegotiable" state-law right does not automatically exempt claims from preemption, and that such claims may be preempted in certain instances. *Lingle*, 486 U.S. at 408 n.7. The Fifth Circuit correctly concluded that "[t]he situation described by the *Lingle* Court is the situation presented in this case," (App., *infra*, 5a), because Petitioner's complaints about training opportunities, promotions, and seniority are without merit unless Respondent is found to have violated the CBA. Petitioner's theory of the case, and the particular employment decisions about which he complains, depend on a construction of his contractual seniority rights and are therefore preempted under this discrete set of facts. *Id.*

B. The Court of Appeals Correctly Followed *Lingle*'s Holding That a "Nonnegotiable" State-Law Right Must Succumb to LMRA Preemption in Certain Instances.

1. *Lingle* Contemplated the Preemption of "Nonnegotiable" Rights.

To the extent Petitioner argues that the result below was anomalous and that it is "contrary to decisions of this Court,"[22] he has failed to explain (or even acknowledge) the fact that the court of appeals expressly followed, and indeed quoted from,[23] this Court's decision in *Lingle*:

> Petitioner points to the fact that the Illinois right to be free from retaliatory discharge is nonnegotiable and applies to unionized and nonunionized workers alike. While it may be true

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[22] Pet. at 8.

[23] App., *infra*, 5a.

> that most state laws that are not pre-empted by § 301 will grant nonnegotiable rights that are shared by all state workers, we note that neither condition ensures nonpre-emption. It is conceivable that a State could create a remedy that, although nonnegotiable, nonetheless turned on the interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301. Similarly, if a law applied to all state workers but required, at least in certain instances, collective-bargaining agreement interpretation, the application of the law in those instances would be pre-empted.

Lingle, 486 U.S. at 407-08 n.7.[24] Indeed one wonders how the application of the law *as stated in* Lingle could

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[24] Other courts have applied this passage from *Lingle* in accordance with the Fifth Circuit's treatment of it to find that "nonnegotiable" rights were preempted. *See, e.g., Davis*, 21 F.3d at 868 (holding that LMRA preempted disability discrimination claim under Missouri Human Rights Act which "would require an examination of the seniority rights of both Davis and other employees under the collective bargaining agreement"); *Stikes*, 914 F.2d at 1268 (holding that state right to privacy claim, "even if . . . nonnegotiable in the collective bargaining process," was preempted under *Lingle*); *Cole v. General Motors Corp.*, 641 F. Supp. 28, 32 (W.D. Mich. 1984) (holding that LMRA preempted claim under Michigan antidiscrimination statute because "application of the . . . [state statute] could potentially alter or abrogate rights and duties which GMC and the UAW have collectively bargained for"). Accordingly, to the extent Petitioner relies on *Ramirez v. Fox Television Station*, 998 F.2d 743, 749 (9th Cir. 1993), to suggest that the court of appeals' decision in this case is aberrant, Respondent respectfully suggests that *Ramirez*, in failing even to cite note 7 from *Lingle*, is out of step with the prevailing law. *See Ramirez*, 998 F.2d at 748 (stating, contrary to *Lingle*, that the LMRA never preempts "causes of action which assert nonnegotiable state law rights") (quotation

"threaten[ ] to completely eviscerate the *Lingle* standard,"[25] as Petitioner contends.

2. Petitioner's "Nonnegotiable" Statutory Right is Preempted in This Case Because Resolution of the Claim is Substantially Dependent Upon an Interpretation of the CBA.

In order to determine whether Petitioner's discrimination claim under the Texas Labor Code is preempted, a court "must examine whether proof of the state law claim requires interpretation of [the] collective bargaining agreement terms." *DeCoe*, 32 F.3d at 216. Once again, preemption occurs "if *any* of the elements require a construction of the agreement." *Stikes*, 914 F.2d at 1268 (emphasis added).[26]

To establish a prima facie case under the Texas Labor Code, Petitioner has the burden of proving (1) that he was a member of a protected class; (2) that he experienced an adverse employment decision; and (3) that non-protected employees were treated dissimilarly. *See Austin State Hosp. v. Kitchen*, 903 S.W.2d 83, 90 n.9 (Tex. Ct. App. 1995) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). If Petitioner carried this burden, Respondent would be required to articulate legitimate, non-discriminatory reasons "sufficient to raise a genuine issue of fact that its employment action was not the result

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marks omitted). Respondent further observes that the seniority issues central to the instant case were not at issue in *Ramirez*. *Id.* at 745-46.

[25] Pet. at 19.

[26] *See also Leonardis v. Burns Int'l Sec. Servs., Inc.*, 808 F. Supp. 1165, 1183 n.24 (D.N.J. 1992).

of discriminatory animus but instead was motivated by a legitimate reason." *Id.* The burden would then shift back to the employee "and merge[ ] with [his] ultimate burden of persuading the trier of fact that the employer's proffered reason for its action is mere pretext and that [he] has been the victim of unlawful discrimination." *Id.* Furthermore, the Texas Supreme Court has acknowledged that the standard for recovery under the statute requires proof of "but for" causation. *See Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 636 (Tex. 1995) (stating in whistleblower case that the causation standard in this "and similar cases" is whether, "without it [the protected trait or conduct], the employer's prohibited conduct would not have occurred when it did").

Petitioner's burden of establishing an adverse employment action requires, as a threshold, proof that he had a right or entitlement to a promotion or other opportunity. Answering the question whether Petitioner possessed *any* such entitlement requires consideration of the provisions of the CBA that provide that *"[s]election, promotion . . . transfer* and/or *assignment* of Head Journeymen . . . shall be within the sole discretion of the Company, and . . . [c]onsideration may include, but is not limited to, ability, skill, qualifications, performance, *seniority*, attendance, and conduct," and that "[e]xcept as to Head Journeymen . . . in the event of *promotions* . . . where ability, skill and qualifications are equal, *seniority* shall govern." (CBA, art. XVII, § 3, R. at 000077 (emphasis added).) Petitioner also alleges that "he has been denied the requested training and thereby denied access to *promotional* opportunities within HL&P because

of his race"[27] and that he "was denied a *promotion*" when "a white employee with *less seniority* than Plaintiff, John Malarka, was *promoted.*" (R. at 000053 (emphasis added).) Additionally, Petitioner asserts that he has "been denied the opportunity to train in the Fiber Optics program" and "has been denied the opportunity to attend 'Troubleshooting Class.' " (*Id.*)

The CBA delineates seniority as one of several factors for consideration in promotion analyses. (R. at 000085, 000079-000065.) Consequently, in order to evaluate the disparate treatment prong of Petitioner's prima facie case, and in order to determine whether Respondent's reasons for the adverse employment decisions were pretextual, *see Austin State Hosp.*, 903 S.W.2d at 90 n.9, a court would have to determine whether Petitioner had a contractual right to the promotion and training opportunities at issue, and whether Respondent somehow abused its contractual right to make promotion and work assignment decisions, including the weight, if any, to be afforded to seniority. Moreover, deciding "but for" causation under *Hinds* would require a court to undertake a determination of whether, due to the seniority preference Petitioner deems controlling, he would have been promoted and given the requested training if race were not allegedly a factor in the employment decisions at issue. *Hinds*, 904 S.W.2d at 636. In sum, it is simply not possible for Petitioner to establish a cause of action under the Texas Labor Code claim in this case without interpreting, and perhaps even attempting to supersede, the terms of the CBA.

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[27] R. at 000054.

This conclusion flows from the fact that Petitioner's Texas Labor Code claim is expressly based on Respondent's supposed failure to follow the dictates of the CBA's seniority provisions. (*See* R. at 000027 (stating that a white employee *"with less seniority than Plaintiff . . . was promoted"*) (emphasis added).) As Professor White noted in discussing an analogous case, "[w]hen . . . the employer denies retaliation and claims its actions were dictated by the contract, an analysis of the contract necessarily must occur." White, 41 Ala. L. Rev. at 431. Moreover, Professor White has observed that "[w]ere a court to examine the seniority system and find there were positions available, the asserted motivation should be deemed pretextual. *But it is precisely this inquiry that section 301 forbids. Whenever such analysis must occur, the claim ought to be preempted." Id.* n.232 (emphasis added). In the case at bar, Respondent denied Petitioner's allegations and contended that "[a]ll actions taken by HL&P concerning Reece's employment, including his promotional opportunities, were for reasons other than Reece's race." (R. at 000010.) Under the narrow factual setting of this case, because Petitioner's theory of recovery is tied to seniority, training, and promotions, the LMRA preempts Petitioner's race discrimination claim under *Lingle*. 486 U.S. at 407-08 n.7.

IV. Petitioner's Objections to an "Undesirable Litigation Dynamic" Resulting from *Avco* Do Not Justify Granting the Writ.

Petitioner finally contends that the Court should reconsider its post-*Avco*[28] labor law jurisprudence.

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[28] 390 U.S. at 560.

Indeed, he apparently seeks to have this Court overrule *Avco* itself. In particular, Petitioner laments the fact that *Avco* allows a defendant to remove a state court suit when the claims asserted would require the interpretation of a CBA. This result, he claims, "substantially increas[es] the workload of the federal courts." (Pet. at 19; *id.* at 23 ("[T]he result is that many more cases are imposed on the federal dockets (and an employee-plaintiff's litigation burdens become all the greater) than there ought to be.").)[29]

Petitioner's argument is unfounded. In *Local 174, Teamsters v. Lucas Flour Co.*, this Court observed that "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." 369 U.S. at 103-04 (citations omitted). Moreover, "in enacting § 301 Congress intended doctrines

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[29] Petitioner also bemoans the "employer's litigation advantage" arising from the fact that "[f]requently . . . the employee-plaintiff's lawyer is a state court practitioner who rarely appears in federal court." (Pet. at 23.) Aside from being a gross generalization with absolutely no empirical support, Petitioner's argument is simply not a basis for granting Supreme Court review. In the civil context, the federal courts simply do not concern themselves with the alleged quality or experience of counsel. *Cf. United States v. Cronic*, 466 U.S. 648, 665 (1984) (noting that counsel are presumed to be competent and holding that youth and inexperience of counsel did not provide basis for claim of ineffective assistance of counsel); *Square Liner 360 Degrees, Inc. v. Chisum*, 691 F.2d 362, 374-75 (8th Cir. 1982) (stating that inexperienced counsel did not deprive civil litigant of its " 'day in court' ").

of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104.[30] The Supreme Court thus determined in *Lucas Flour* that a "state rule that purports to define the meaning or scope of a term in a contract suit therefore is preempted by federal labor law," and in *Lueck* the Court extended this rule to cases "alleging liability in tort." *Lueck*, 471 U.S. at 210-11.

In order to guarantee that federal labor law remains preeminent in § 301 suits and that it was construed consistently, the Court applied *Lucas Flour* in *Avco*, 390 U.S. at 560, to hold that an employer may properly remove a suit brought in state court asserting claims that are substantially dependent upon a construction of a CBA "despite the plaintiff's failure to plead a federal cause of action, because the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization." *Lingle*, 486 U.S. at 406 n.5 (citations and quotation marks omitted). Thus, the removability of state-law claims preempted by the LMRA derives directly from *Avco*, and Petitioner's argument regarding an "undesirable litigation dynamic" amounts to nothing more than an expression of dissatisfaction with that result. Obviously, something more substantial than the rationale offered thus far by Petitioner must be advanced to justify a request to overrule a holding as well-settled

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[30] *See also Lueck*, 471 U.S. at 210-11 ("[T]he policies that animate § 301 . . . require that 'the relationships created by [a collective-bargaining] agreement' be defined by application of 'an evolving federal, common law grounded in national labor policy.' ") (quoting *Bowen v. United States Postal Serv.*, 459 U.S. 212, 224-25 (1983)) (second alteration by Court).

and widely accepted as the removability principle of *Avco*.[31]

In addition, if this Court overruled *Avco* and disallowed the removal of state-law claims preempted by the LMRA, "all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211. As this Court cogently explained in *Lueck*:

> The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate. Exclusion of such claims 'from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.'

Id. (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962)). Petitioner offers no reason to doubt the wisdom of the *Lueck* Court's observation.

Finally, the Court should be chary of accepting Petitioner's invitation to overrule *Avco* and to diminish the preemptive effect of § 301 because of the deleterious

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[31] In support of his anti-*Avco* argument, Petitioner cites two cases that are distinguishable from this one. As Petitioner admits, *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), was "not one involving a CBA," (Pet. at 21), or even the LMRA, but rather a suit for the recovery of excise taxes from an Indian tribe and centered on sovereign immunity issues. *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), involved the alleged breach of several individual employment contracts through the announcement of a layoff. It did not involve tort and statutory claims pertaining to a current employee's seniority rights, as does the instant case.

consequences of this action on "the central role of arbitration in our 'system of industrial self-government.' " *Lueck*, 471 U.S. at 219 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960)). As this Court has declared, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 369 U.S. at 104. "Grievance and arbitration are important cogs in the machinery." *Jackson v. Liquid Carbonic Corp.*, 863 F.2d 111, 121 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989). Adopting Petitioner's argument would raise the same grave concerns expressed by this Court in *Lueck*:

> Perhaps the most harmful aspect of the Wisconsin decision is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement. The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*. The parties here have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract. Unless this suit is preempted, their federal right to decide who is to resolve contract disputes will be lost.

471 U.S. at 219 (citation omitted). Consequently, the Court should reject Petitioner's ill-considered invitation because, as the First Circuit correctly concluded, "[a] plaintiff should not be allowed to bypass the grievance procedures established by the labor contract in a case where his claims are so clearly dependent on interpretation of the terms of that contract. Allowing such an end

run would surely undermine the structure of industrial self-government."[32]

CONCLUSION

For the foregoing reasons, the Court should deny the Writ.

Respectfully submitted,

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[32] *Jackson*, 863 F.2d at 122.

APPENDIX A

RAYMOND L. REECE, Plaintiff-Appellant,

v.

HOUSTON LIGHTING & POWER COMPANY, Defendants-Appellee.

NO. 95-20646.

United States Court of Appeals,

Fifth Circuit.

April 10, 1996.

Appeal from the United States District Court for the Southern District of Texas.

Before BARKSDALE, DeMOSS and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

I. FACTS AND PROCEEDINGS BELOW

Reece is an employee of HL&P, subject to a collective bargaining agreement (CBA) which contains a mandatory grievance and arbitration procedure. Reece filed suit against HL&P in state court, alleging that, on the basis of his race, he was (1) denied promotions and training; (2) retaliated against for engaging in a protected activity; and (3) subjected to the intentional infliction of emotional distress. Reece never filed a grievance under the CBA, and the time for doing so has run.

HL&P answered and removed the case to federal court. The district court denied Reece's motion to remand, concluding that § 301 of the Labor Management

Relations Act (LMRA) preempted Reece's causes of action. *See* 29 U.S.C. § 141, *et seq.* The district court then granted HL&P's motion for summary judgment, finding that Reece's claims were barred because of his failure to exhaust his mandatory administrative remedies under the CBA.

Reece appeals only the remand issue.

II. ANALYSIS

At issue is whether the district court properly concluded that § 3401 of the LMRA preempted Reece's claims. Preemption is a question of law reviewed de novo. *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 278 (5th Cir. 1994). If the resolution of Reece's claims will require "interpretation" of the CBA, then the state-law remedies upon which Reece relies are preempted by § 301 of the LMRA. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S. Ct. 1877, 100 L.Ed.2d 410 (1988). Thus, the dispute is whether the CBA must be interpreted in resolving Reece's claims.

A. *Discrimination Claim*:

To establish a *prima facie* case of discrimination under the Texas Labor Code, Reece would have to prove that he (1) was a member of a protected class; (2) suffered an adverse employment action; and (3) was treated dissimilarly from the non-protestant employees. *Farrington v. Sysco Food Serv., Inc.* 865 S.W.2d 247, 251 (Tex. App. – Houston [1st Dist.] 1993, writ denied). If Reece were to establish a *prima facie* case, HL&P would then have the

burden of articulating a legitimate, non-discriminatory reason for the allegedly unequal treatment. *Id.* Then the burden would shift back to Reece to prove that the articulated reason was a pretext for unlawful discrimination. *Id.*

Reece's discrimination claim turns on questions of promotion, seniority, and assignment to training programs, all of which are provided for in the CBA. HL&P will undoubtedly rely on the CBA as its legitimate, non-discriminatory reason for Reece's treatment. When Reece then attempts to show that HL&P's stated reason is pretextual, the CBA would have to be interpreted because Reece would have to challenge HL&P's rights under the CBA. Thus, the interpretation of the CBA "is made necessary by an employer defense." Rebecca Hanner White, *Preemption of State Law Claims: A Model for Analysis*, 41 Ala. L. Rev. 377, 427 (1989).

B. *Intentional Infliction of Emotional Distress Claim:*

For Reece to sustain his claim of intentional infliction of emotional distress under Texas law, he must prove that (1) HL&P acted intentionally or recklessly; (2) HL&P's conduct was extreme and outrageous; (3) such conduct caused emotional distress; and (4) such distress was severe. *Baker*, 34 F.3d at 280. In order to evaluate whether HL&P's conduct was "outrageous." the conduct must be measured against the CBA.

Thus, the resolution of Reece's claims will require interpretation of the CBA. Therefore, the claims are preempted by § 301 of the LMRA.

We acknowledge that the Ninth Circuit has taken a much more lenient view of preemption of state law discrimination claims. *See, e.g., Ramirez v. Fox Television Station, Inc.*, 998 F.2d 743, 748 (9th Cir. 1993) ("In every case in which we have considered an action brought under the California Employment Act, we have held that it is not preempted by section 301.") (collecting cases). Nevertheless, we find that *Lingle* mandates our analysis.

This result is strengthened by the policies behind preemption in this context. The Supreme Court has recognized the unique need for uniformity in the interpretation of labor contracts:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contact provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing. . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peach. State law which frustrates the effort of congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103-04, 82 S. Ct. 571, 577, 7 L.Ed.2d 593 (1962) (citations omitted).

[8] Reece argues that the right to be free of discrimination is a non-negotiable state-law right that cannot be altered or waived by agreement. Nevertheless, *Lingle* forecloses such an argument: "It is conceivable that a State could create a remedy that, although non-negotiable, nonetheless turned on an interpretation of a collective-bargaining agreement for its application. Such a remedy would be pre-empted by § 301." *Lingle*, 486 U.S. at 407 n.7, 108 S. Ct. at 1882 n.7. The situation described by the *Lingle* Court is the situation presented in this case.

The district court's denial of the motion to remand is therefore AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE Plaintiff	§ § §	
VS.	§	CIVIL ACTION NO.
HOUSTON LIGHTING & POWER CO.,	§ §	H-95-1025
Defendant	§	

MEMORANDUM AND ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race is Defendant Houston Lighting & Power Company's motion for summary judgment for failure to exhaust administrative remedies (instrument #15).

This Court has previously held that the claims of Plaintiff Raymond Reece, employed by Defendant as a head cable splicer and subject to a collective bargaining agreement ("CBA"), are preempted by the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1988). The CBA includes a mandatory grievance and arbitration procedure as the exclusive remedy for violations of the CBA.[33] Moreover the CBA requires that a grievance must be filed within five days, and that any grievance not filed within the proscribed period "shall be conclusively

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[33] CBA, Art. XVI, §§ 1-2, 4.

deemed to have been waived." CBA, Art. XVI § 3. "as a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as a mode of redress [emphasis added]." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). *See also Thomas v. LTV Corp.*, 39 F.3d 611, 621 (5th Cir. 1994) ("[I]f the arbitration-and-grievance proceeding is the exclusive remedy for breach of the CBA, the employee may not sue his employer under section 301 until completion of the proceeding"); *Strachan v. Union Oil Co.*, 768 F.2d 703, 704 (5th Cir. 1985) ("The law is completely clear that employees may not resort to state tort or contract claims in substitution for their rights under the grievance procedure in a collective bargaining agreement."); *Ross v. Runyon*, 858 F. Supp. 630, 634 (S.D. Tex. 1994) ("Before bringing suit, the employee must at least attempt to exhaust the grievance and arbitration procedures established by the bargaining agreement.") Defendant argues that Reece's failure to file a timely grievance and to exhaust these exclusive remedies under the CBA, which constitutes a violation of the CBA,[34] waives his right to pursue his claims and requires that summary judgment be granted to Defendant and that these now untimely claims be dismissed with prejudice. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 563 (1976) ("unless [the bargaining unit employee] attempted to utilize contractual procedures for settling his dispute with his employer, his independent suit against the

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[34] CBA, Art. XVI, §§ 1-4.

employer in District Court would be dismissed"); *Parham v. Carrier Corp.*, 9 F.3d 383, 392 (5th Cir. 1993) ("we render a take-nothing judgment against Parham on his breach of collective bargaining agreement claims, for failure to invoke the grievance procedures required under the CBAs"); *Strachan*, 768 F.2d at 706-07 (affirming summary judgment for employer where state tort claims were pre-empted by federal law and employees failed to exhaust grievance procedures).

Conceding that if the LMRA preempts his claims because they require interpretation of the CBA, then he was required to exhaust grievance procedures established by the CBA, Plaintiff responds that pursuant to a continuing violation theory of discrimination, he has exhausted the exclusive grievance and arbitration procedures established by the collective bargaining agreement. On March 12, 1990, he filed a Charge of Discrimination (No. 330 90 1276) alleging that he was subjected to different terms and conditions of employment because of his race. He also filed a grievance against Defendant for violations of the CBA, Article XV § 6, which was found by the Arbitrator to lack merit. He provides copies of both. Plaintiff filed a lawsuit, *Raymond L. Reece v. Houston Lighting and Power Co.*, 234th Judicial District Court, Harris County, Texas, which was resolved by a settlement agreement and a final release on January 5, 1993. Plaintiff filed another Charge of Discrimination on April 18, 1994, alleging that since January 4, 1993, he had been retaliated against for having filed a lawsuit based on a previous charge of discrimination and had been denied training and promotions because of his race. He points out various instances

of racial discrimination in training and promotion against blacks at HL&P.

Plaintiff notes that to establish a continuing violation he must show that the violation was part of a continuously maintained illegal employment practice. *Ross*, 858 F. Supp. at 637; *Perez v. Laredo Junior College*, 706 F.2d 731, 734 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). He has shown the history of his charges and the application of an illegal policy toward him and others of his race. Moreover since the settlement of his first lawsuit in January 1993, he has been passed over eight times for a promotion to crew leader/foreman positions for which he was qualified and which were assigned to white males, and he was demoted for a longer time for falsifying company documents and misuse of company assets than was a white male who tested positive of drug use. He notes that the settlement agreement required Defendant to expunge his personnel file of the Firm and Final Warning issued to him on February 5, 1990, but no expungement took place. He therefore insists that fact issues exist as to whether Plaintiff exhausted his remedies under the CBA under a continuing violation theory.

Alternatively he argues that an employee does not have to exhaust available grievance procedures if exhaustion of those remedies would be futile. *Parham*, 9 F.3d at 390-91; *Rabelais v. Dresser Indus., Inc.*, 566 F.2d 518, 519 (5th Cir. 1978). An employee has the burden of producing some evidence that use of the grievance procedure would be futile. *Parham*, 9 F.3d at 391. Accordingly Plaintiff points out that his grievance and first Charge of Discrimination were based on the CBA, Article XV, § 6, and that Defendant has asserted that the same provision governs

Plaintiff's allegations here. Moreover he presents a portion of a letter dated July 25, 1990 from the Union's[35] legal counsel in reference to that part of the CBA:

> Moreover, we have, in the past arbitrated this issue, an issue indistinguishable from your client's grievance, and have done so without success. In other words not only does that contract language[36] appear fairly clear, but an Arbitrator has interpreted that language so as to render your client's grievance without merit.

After reviewing the record, the Court finds that Plaintiff has not pleaded a continuing violation in his original petition, which has not been superseded. Instead his original petition references the Charge of Discrimination that he filed with the Equal Employment Opportunity Commission and the Texas Commission on Human Rights on April 18, 1994, Charge No. 330942039, attached as exhibit A, and the subsequent Notice of Right to Sue letter. That charge focuses on an April 18, 1994 denial of promotion to foreman because of his race and in retaliation for filing the lawsuit. The petition further alleges ongoing failure to train on July 25, 1994 in retaliation for filing the April 18, 1994 charge. As its third and final allegation, the petition asserts that on August 9-11, 1994

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[35] The International Brotherhood of Electrical Workers

[36] The Court notes that this letter refers to grievance filed by Plaintiff limited to his demotion from the status of "Head" Journeyman, to that of simply Journeyman.

The language referred to is the CBA's Article XV, § 6, "selection, promotion, demotion, transfer and/or assignment of Head Journeymen and Head Operators . . . [are] within the sole discretion of the Company."

Plaintiff was denied the opportunity to attend a "Trouble-shooting Class" because of race and retaliation.

The Court notes that a plaintiff cannot use a continuing violation theory "to resurrect claims about discrimination concluded in the past. . . . " *McGregor v. Louisiana State University Bd. of Supervisors*, 3 F. 3d 850, 867 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1103 (1994). Plaintiff's earlier claims were administratively exhausted, then settled during a lawsuit with a full and final release executed. Second, there is no mention in the petition of the previous charges on which he sought to exhaust the grievance procedure under the CBA. Moreover retaliation is a distinct basis for alleging discriminatory conduct, one never presented to the Arbitrator. Thus the Court rejects Plaintiff's continuing violation theory, apparently raised for the first time in response to Defendant's motion for summary judgment, as a means to circumvent the exhaustion requirement.

Nor does Plaintiff, who made no effort to exhaust his intra union remedies,[37] make sufficient showing of futility to excuse his failure to attempt to use the grievance and arbitration procedure this time. Plaintiff makes no showing that the union officials who would hear his grievance were so hostile that he could not hope to obtain a fair hearing on his claims or that the grievance procedures would be inadequate or that they would unreasonably delay his opportunity to obtain judicial review.

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[37] It is clear from Plaintiff's earlier grievance that he was fully aware of the need to exhaust remedies under the CBA.

While the letter sent by the union counsel did not encourage Plaintiff to expect a good result, it was limited to his challenge to his demotion from the Head Journeyman position and constituted a realistic assessment of that narrow issue in light of the clear and unambiguous language of the CBA giving the Company complete discretion. By itself, without any effort on Plaintiff's side to attempt to use the exclusive grievance and arbitration remedies for his new and largely different claims, the letter cannot excuse Plaintiff from mandatory exhaustion requirements. Otherwise anyone with an unlikely chance of success could argue futility. Noting that "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes . . . ," and that the courts have held that an employee must have at least attempted to use them before initiating a lawsuit, the Fifth Circuit has stated, "The futility exception requires exactly that – futility. Before a plaintiff may safely disdain available grievance procedures, invoking those procedures must truly be futile: not annoying bureaucratic, or unpromising, but futile. An employee has the burden of producing some evidence that resort to available grievance procedures would in fact be futile: his mere subjective belief or conclusory assertion would not suffice." *Parham*, 9 F.3d at 391 (emphasis added).

Accordingly, the Court

ORDERS that Defendant's motion for summary judgment is GRANTED and that Plaintiff's claims are DISMISSED with prejudice for failure to exhaust administrative remedies.

SIGNED at Houston, Texas, this 8th day of August, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAYMOND REECE, Plaintiff, vs. HOUSTON LIGHTING & POWER CO., Defendant.	§ § § § § § § § §	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging employment discrimination in promotion and training based on race are, *inter alia*, Plaintiff Raymond Reece's motion to amend interlocutory order (instrument #7), Plaintiff's motion for reconsideration of the Court's denial of his motion for remand (#8), Plaintiff's request for oral hearing on his motion for reconsideration (#9), and Plaintiff's unopposed motion to stay ruling on Defendant Houston Lighting & Power's motion for reconsideration (#17). This action was removed on the basis of complete preemption under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 185 *et seq.*, because Plaintiff is a bargaining unit employee and his claims require interpretation of the collective bargaining agreement ("CBA"). The Court denied Plaintiff's motion to remand for the same reason on April 30, 1995.

Plaintiff requests amendment of the Court's order denying remand so that it can be immediately appealed. Because the matter is one of established law in this Circuit and because this Court finds no good reason for piecemeal litigation and delay in the instant suit, it denies the motion to amend its order.

Plaintiff moves the Court to reconsider its order denying remand because he asserts that his state-law claims for intentional infliction of emotional distress and race discrimination do not require interpretation of provisions of the CBA.

After reviewing the record and the applicable law, this Court has not changed its mind that removal was proper because of complete preemption of the LMRA. Plaintiff complains that Defendant's refusal to promote him to foreman or to assign him to certain training classes alone caused him emotional distress. Article XV, § 6 of the CBA governs Defendant's exclusive, discretionary right to select, promote, demote, transfer or assign head cable splicers after consideration by Defendant or "ability, skill, qualifications, performance, seniority, attendance and conduct," and with a right to file a grievance reserved to Plaintiff. To sustain a claim for emotional distress in Texas, a plaintiff must prove that (1) the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that defendant's conduct caused the plaintiff's emotional distress, and (4) that the emotional distress was severe. *Tidelands Automobile Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. – Beaumont 1985, writ ref'd n.r.e.). Thus as the alleged sole cause of his emotional distress, Defendant's refusal to promote Plaintiff or assign him to requested training

must be extreme or outrageous to prevail on his claim. Because the emotional distress claim is unavoidably and inextricably intertwined with Defendant's conduct in failing to promote or assign Reece where Reece desired, the essential element of extreme and outrageous conduct to establish intentional infliction of emotional distress implicates the provisions of the CBA that give Defendant the right to promote and to assign training. Thus the state law claim is preempted. *Baker v. Farmers Elec. Coop.*, 34 F.3d 274 (5th Cir. 1994); *see also Hirras v. National R.R. Passenger Corp.*, 44 F.3d 278, 283 (5th Cir. 1995) ("[I]f a CBA [can] be interpreted to give an employer the right to engage in conduct that is the subject of an emotional distress claim, an interpretation of the right granted by the CBA is necessary to the resolution of that claim," *citing Baker*, 34 F.3d at 280). Because Plaintiff's claim involves questions of promotability, seniority, and work assignments, it is inextricably intertwined with terms of the CBA that give Defendant the exclusive discretionary right to determine which employees will be promoted or trained. *Medrano v. Excel Corp.*, 985 F.2d 230, 233 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993).

For these reasons the Court

ORDERS that Plaintiff's motion to amend interlocutory order and motion for reconsideration are DENIED. The Court further

ORDERS that Plaintiff's request for oral hearing and motion to stay ruling are MOOT.

SIGNED at Houston, Texas this 24th day of July, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE

RAYMOND REECE, Plaintiff, vs. HOUSTON LIGHTING & POWER CO., Defendant.	§ § § § § § § §	CIVIL ACTION NO. H-95-1025

ORDER

Pending before the Court in the above referenced action alleging denial of the promotion and work assignments in violation of state law is Plaintiff Raymond Reece's motion for remand (instrument #4). Because this Court agrees that Plaintiff's claims require interpretation in the collective bargaining agreement and are therefore preempted by section 301 of the Labor Management Relation Act ("LMRA"), 29 U.S.C. § 185(a), the Court

ORDERS that the motion is DENIED.

SIGNED at Houston, Texas this 30th day of April, 1995.

MELINDA HARMON /S/
UNITED STATES DISTRICT JUDGE